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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 106

MOSE HIGHTOWER AND CELESTINE MORRIS,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The circuit court of appeals orally affirmed the judgment of the district court (R. 104-105) without a written opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 20, 1948 (R. 104) and the petition for a writ of certiorari was filed June 3, 1948. The jurisdiction of this Court is invoked under Section

240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, in a prosecution under 26 U. S. C. §2554(a), making unlawful the sale of opium or its derivatives except pursuant to written orders on forms issued in blank for that purpose by the Secretary of the Treasury, the burden of the evidence was on the prosecution to prove that sales were not made pursuant to such written orders.

STATUTORY PROVISION INVOLVED

26 U. S. C., §2554(a) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary [of the Treasury.]

STATEMENT

The facts relevant to this petition are undisputed and briefly summarized are as follows:

The petitioners, Mose Hightower and Celestine Morris, were indicted, on August 6, 1946, in multiple counts, along with two others, Aline Boyd and Guy Chaffin, in the United States District

Court for the Northern District of Illinois, Eastern Division, for conspiracy to sell and for the substantive offenses of selling quantities of a derivative of opium not in pursuance of written orders on the proper blank (R. 2-5). Chaffin pleaded guilty and was sentenced to two years' imprisonment (R. 7), and the charge against Boyd was dismissed because she could not be found (R. 10-11). The petitioners herein pleaded not guilty (R. 6), waived jury trial through their respective counsel (R. 8, 9), and were found not guilty of the conspiracy count (R. 87), but Hightower was found guilty on two counts charging the substantive offenses, and Morris on one (R. 87). The latter was sentenced to two years' imprisonment (R. 89), and Hightower was ordered imprisoned for a period of three years (R. 91-92).

Counts 2 and 3 on which Hightower was convicted involved sales occurring on November 5 and 7, 1945, at Chicago to one Cleo Harris, who was a witness for the prosecution at the trial (R. 54), and the sale charged in count 7 on which petitioner Morris was convicted occurred on March 3, 1946, at Chicago, and one Felsenheld, the vendee therein likewise testified for the Government (R. 14). Corroborating the testimony of these two witnesses were three narcotic agents and a district supervisor of the Bureau of Narcotics.

With regard to the sale by petitioner Morris, Felsenheld, the informer and a confessed drug addict,

testified that he knew both petitioners; that on March 3, 1946, he telephoned Hightower and sought to purchase a quantity of narcotics; he was told by Hightower that petitioner Morris would meet him that evening at a given location (R. 15). Thereafter, he contacted Newman, a narcotic agent, who searched him (R. 16), and furnished him $8. He met petitioner Morris at the rendezvous, drove her in his taxicab to the 1900 block of Washington Boulevard, Chicago, and in reply to her question as to the amount he wanted to buy, replied he wanted a grain (R. 16). At their destination, Morris entered a building and cam(out with four one-quarter grain tablets of morphine which she gave to Felsenheld in exchange for the $8. (R. 16). The tablets were placed in an envelope, initialed by the witness, and were subsequently introduced in evidence without objection (R. 19). This testimony was corroborated by agent Newman, who testified that he had searched Felsenheld to determine that he had no narcotics, gave him $8, followed Felsenheld's cab, saw petitioner Morris enter it and later on the same evening met Felsenheld at a hotel where the latter gave the four tablets to him (R. 26).

Cleo Harris, the informer against Hightower, testified that on November 5, 1945, he had a conversation with Hightower at 3758 South Ellis Avenue, Chicago, relative to the sale of narcotics, and the latter ordered a woman who was present to sell

him a "couple of capsules" for $7, which was done (R. 54-55). Later on the same day, Hightower sold the informer another package for $6, which package was given by Harris to a narcotic agent (R. 55). Harris also testified that on November 7, 1945, he was searched by agent Frey, who then gave him $15 in order to purchase some heroin from Hightower. Harris went to the fish market where Hightower worked, and was told by the latter to meet him later on that day in front of a hotel, where Hightower and another unidentified man sold him three capsules of heroin for $9. (R. 58.)

Agents Frey, Newman and Gordon corroborated the testimony of Harris. Newman and Gordon testified that on November 5, 1945, Harris, was searched, was found to have no narcotics on him, and was furnished $25. Later on that day they met him, and he handed them the package containing a mixture of heroin and morphine, and change amounting to seventeen or nineteen dollars. (R. 28, 30.) The drug from the package was admitted in evidence without objection (R. 29). Agent Frey testified that on November 7, 1945, he searched Harris, found no narcotics, gave him $9, and followed him to the aforementioned hotel where he was observed by them in conversation with Hightower and another man. Later on Harris gave Frey three capsules of morphine, which were introduced in evidence without objection. (R. 46-47.)

ARGUMENT

Petitioners do not contend that there was not sufficient evidence to support the finding that the sales by petitioners actually took place; their sole objection is that the prosecution failed to introduce evidence that the surreptitious sales were not in pursuance of written orders on appropriate forms.

A short answer to the contention is that the circumstances of the sales permit the obvious inference that the transactions did not include written orders on appropriate forms. But in any event, it has been repeatedly held that the prosecution in a narcotic case of this type need neither allege (*Chin Gum* v. *United States,* 149 F. 2d 575, 577 (C. C. A. 1); *Nigro* v. *United States,* 117 F. 2d 624, 629 (C. C. A. 8); *Hurwitz* v. *United States,* 299 Fed. 449, 450 (C. C. A. 8), certiorari denied, 266 U. S. 613; *Manning* v. *United States,* 275 Fed. 29 (C. C. A. 8); *Oakshette* v. *United States,* 260 Fed. 830 (C. C. A. 5); *Wallace* v. *United States,* 243 Fed. 300, 304 (C. C. A. 7), certiorari denied 245 U. S. 650), nor prove (*Chin Gum* v. *United States, supra; Sauvain* v. *United States,* 31 F. 2d 732, 733 (C. C. A. 8); *Martinez* v. *United States,* 25 F. 2d 302, 303 (C. C. A. 5)), that the sale was made without a written order on the form prescribed.[1] These cases are supported either on the theory that that

[1] Compare *Crapo* v. *United States,* 100 F. 2d 996, 1001 (C. C. A. 10), which involved a prosecution for transferring a firearm not in pursuance of a written order on an appro-

part of §2554(a) reading, "except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary" of the Treasury creates an exception to the operation of the statute (*Manning* v. *United States, supra*), in which case the rule applies that it is unnecessary for the prosecution to plead or prove the exception (*Nicoli* v. *Briggs,* 83 F. 2d 375, 379 (C. C. A. 10), and cases cited therein); or that the above quoted provision is an essential element of the offense created by the section, requiring it to be alleged in the indictment in order that accused parties may be put on notice of the nature of the charge against them, and in order to prevent possible double jeopardy (cf. *Fippin* v. *United States,* 162 F. 2d 128, 131 (C. C. A. 9), but is a negative averment, in which situation the burden of the evidence is on the accused to disprove it. Thus in *Sauvain* v. *United States, supra,* the court at 31 F. 2d 733, stated:

> It is not incumbent upon the government to prove that the addict had no written order. Entirely aside from the provision of section

priate form, in violation of the National Firearms Act. There was no direct proof that the firearm was transferred to the defendant not in pursuance of a written order, but it was held that the negative averment in the indictment that such was the case placed on Crapo, the burden of the evidence of disproving it because the facts were peculiarly within his knowledge, citing numerous cases.

8 (26 U. S. C. §700), which makes it unnecessary for the government to negative, in either pleading or proof, the existence of exemptions, it has been held that the government need not prove a negative under the Narcotic Law. In *Taylor* v. *United States,* 19 F. (2d) 813, this court said:

"The sales having been established by the government, the burden was on the defendant to prove that he had registered and paid the special tax. The government is not required to prove a negative, if the defendant has in his possession the evidence of the affirmative. [Citing authorities.]"

26 U. S. C. §2554(d) requires every person who accepts a written order, required under §2554(a), to preserve it for two years in order that it might be available for Treasury Department employees or other interested officials. The petitioners' trial in the district court took place on November 5, 1945, within the two-year period from the sales alleged in count seven (sale by Morris on March 3, 1946), and count three (sale by Hightower on November 7, 1945), and one day beyond the two-year period in count two (sale by Hightower on November 5, 1945). Petitioners tendered no evidence at the trial calculated to show that they had such order forms in their files or that they had received them and since had disposed of them.

In *Martinez* v. *United States, supra,* a case involving a sale of morphine without a written order, the court stated, "The presumption arose that the sale was unlawful upon proof that it had been made, because the government was not bound to prove a negative when the fact as to whether there was a written order was one peculiarly within the knowledge of defendant." Petitioners insist that the fact whether there were written orders were not facts within their peculiar knowledge because the prosecution used as witnesses those parties who actually purchased the opium derivatives from petitioners. This, however, does not detract from the fact that petitioners easily could have established that the sales were pursuant to appropriate orders, if in fact they were. This is particularly so here, for both petitioners took the witness stand. In this aspect the case is controlled by *Chin Gum* v. *United States,* and *Sauvain* v. *United States,* both *supra.*

In the nature of things, it is much simpler for the accused to prove the affirmative, if in fact the affirmative exists, than for the prosecution to prove a negative, and it is for this reason, as the above-cited decisions demonstrate, that in federal courts especially such burden has been placed on the defendant in all cases where the evidence may more appropriately come from the defendant.[2] In the

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[2] See Annotation, 153 A. L. R. 1218, 1250.

instant case, the denial of petitioners' motions for judgments of acquittal at the close of the Government's case based on the ground of insufficient evidence, placed them on notice that a prima facie case had been made out, and they thus had an opportunity to introduce any evidence that was available refuting the Government's charges. Their failure to introduce the written orders which should accompany each sale, or to claim that they had ever received such orders, can only be explained by the fact that they never received such orders for the sales which were proved to have been made. It is also very significant that at no time in the district court, or in their brief on appeal, or in their brief in support of the petition in this Court, have the petitioners asserted that they had in their possession, or had ever received the required written orders.[3]

Petitioners' heavy reliance (Pet. 14-18) upon *Blockburger* v. *United States*, 284 U. S. 299, is misplaced. The issue there was whether one sale in which the forbidden drug was not in or from the original stamped package and was not sold in pursuance of a written order constituted two offenses.

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[3] Petitioner Morris, convicted as charged in count 7 of selling morphine to Felsenheld, denied on direct examination ever having sold any narcotics to Felsenheld (R. 82) and thereby implicitly denied ever receiving a written order from the latter. *McCurry* v. *United States*, 281 Fed. 532, 534 (C. C. A. 9). Her conviction of the sale would not affect this implicit denial.

In holding that it did, this Court neither considered nor decided the issue presented by this case, and that decision, therefore, is of no comfort to petitioners. This Court disapproved the decision in *Ballerini* v. *Aderholt*, 44 F. 2d 352, because the Fifth Circuit there held that only one offense was involved under facts similar to those of the *Blockburger* case.

CONCLUSION

The evidence of petitioners' guilt is overwhelming. The question presented by the petition for a writ of certiorari is one that has been uniformly resolved by the circuit courts of appeal in favor of the Government's position. It is not one which merits further review by this Court. We respectfully submit that the petition for a writ of certiorari should be denied.

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July 1948.

☆ U.S. GOVERNMENT PRINTING OFFICE 1948—786930/P.O. 26